



8011-01p
SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request,
Copies Available From:

Securities and Exchange Commission
Office of Investor Education and Advocacy
Washington, DC 20549-0213

Extension:

Rule 204

OMB Control No. 3235-0647 SEC File No. 270-586

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (“PRA”), the Securities and Exchange Commission (“Commission”) is soliciting comments on the collection of information provided for in Rule 204 (17 CFR 242.204) under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 204 requires that, subject to certain limited exceptions, if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency it must immediately close out the fail to deliver position by purchasing or borrowing securities by no later than the beginning of regular trading hours on the settlement day following the day the participant incurred the fail to deliver position. Rule 204 is intended to help further the Commission’s goal of reducing fails to deliver by maintaining the reductions in fails to deliver achieved by the adoption of temporary Rule 204T, as well as other actions taken by the Commission. In addition, Rule 204 is intended to help further the Commission’s goal of addressing potentially abusive “naked” short selling in all equity securities.

The information collected under Rule 204 will continue to be retained and/or provided to other entities pursuant to the specific rule provisions and will be available to the Commission and self-regulatory organization (“SRO”) examiners upon request. The information collected will continue to aid the Commission and SROs in monitoring compliance with these requirements. In addition, the

information collected will aid those subject to Rule 204 in complying with its requirements. These collections of information are mandatory.

Several provisions under Rule 204 will impose a “collection of information” within the meaning of the Paperwork Reduction Act.

- I. Allocation Notification Requirement: As of December 31, 2011, there were 4,695 registered broker-dealers. Each of these broker-dealers could clear trades through a participant of a registered clearing agency and, therefore, become subject to the notification requirements of Rule 204(d). If a broker-dealer has been allocated a portion of a fail to deliver position in an equity security and after the beginning of regular trading hours on the applicable close-out date, the broker-dealer has to determine whether or not that portion of the fail to deliver position was not closed out in accordance with Rule 204(a), we estimate that a broker-dealer will have to make such determination with respect to approximately 2.09 equity securities per day.¹ We estimate a total of 2,472,762 notifications in accordance with Rule 204(d) across all broker-dealers (that were allocated responsibility to close out a fail to deliver position) per year (4,695 broker-dealers notifying participants once per day² on 2.09 securities, multiplied by 252 trading

¹ As stated in the adopting release for Interim Final Temporary Rule 204T, the Commission’s Office of Economic Analysis (“OEA”) estimates that there are approximately 9,809 fail to deliver positions per settlement day. Across 4,695 broker-dealers, the number of securities per broker-dealer per day is approximately 2.09 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The National Securities Clearing Corporation (“NSCC”) data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is multiplied by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO. Exchange Act Release No. 58733 (Oct. 14, 2008), 73 FR 61706, 61718 n.107 (Oct. 17, 2008) (“Rule 204T Adopting Release”).

² Because failure to comply with the close-out requirements of Rule 204(a) is a violation of the rule, we believe that a broker-dealer would make the notification to a participant that it is subject to the borrowing requirements of Rule 204(b) at most once per day.

days in a year). The total estimated annual burden hours per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/notification).

II. Demonstration Requirement for Fails to Deliver on Long Sales: As of January 31, 2012, there were 191 participants of NSCC, the primary registered clearing agency responsible for clearing U.S. transactions that were registered as broker-dealers.³ If a participant of a registered clearing agency has a fail to deliver position in an equity security at a registered clearing agency and determines that such fail to deliver position resulted from a long sale, we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 35 securities per day.⁴ We estimate a total of 1,684,620 demonstrations in accordance with Rule 204(a)(1) across all participants per year (191 participants checking for compliance once per day on 35 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 269,540 burden hours (1,684,620 multiplied by 0.16 hours/documentation).

III. Pre-Borrow Notification Requirement: As of January 31, 2012, there were 191 participants of NSCC, the primary registered clearing agency responsible for clearing

³ Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that will implicate the close-out requirements of the rule. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day.

⁴ OEA estimates approximately 68% of trades are long sales and applies this percentage to the number of fail to deliver positions per day. OEA estimates that there are approximately 9,809 fail to deliver positions per settlement day. Across 191 broker-dealer participants of the NSCC, the number of securities per participant per day is approximately 51 equity securities. 68% of 51 securities per day is approximately 35 securities per day. The 68% figure is estimated as 100% minus the proportion of short sale trades found in the Regulation SHO Pilot Study. See <http://www.sec.gov/news/studies/2007/regshopilot020607.pdf>.

U.S. transactions that were registered as broker-dealers.⁵ If a participant of a registered clearing agency has a fail to deliver position in an equity security and after the beginning of regular trading hours on the applicable close-out date, the participant has to determine whether or not the fail to deliver position was closed out in accordance with Rule 204(a), we estimate that a participant of a registered clearing agency will have to make such determination with respect to approximately 51 equity securities per day.⁶ We estimate a total of 2,454,732 notifications in accordance with Rule 204(c) across all participants per year (191 participants notifying broker-dealers once per day on 51 securities, multiplied by 252 trading days in a year). The total estimated annual burden hours per year will be approximately 392,758 burden hours (2,454,732 @ 0.16 hours/documentation).

- IV. Certification Requirement: If the broker-dealer determines that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing agency or has purchased securities in accordance with the conditions specified in Rule 204(e), we estimate that a broker-dealer will have to make such determinations with respect to approximately 2.09 securities per day. As of December 31, 2011, there were 4,695 registered broker-dealers. Each of these broker-dealers may clear trades through a participant of a registered clearing agency. We estimate that on average, a broker-dealer will have to certify to the participant that it has not incurred a fail to deliver position on settlement date in an equity security for which the participant has a fail to deliver position at a registered clearing

⁵ See supra note 3.

⁶ OEA estimates that there are approximately 9,809 fail to deliver positions per day. Across 191 broker-dealer participants of the NSCC, the number of securities per participant per day is approximately 51 equity securities. During the period from January to July 2008, approximately 4,321 new fail to deliver positions occurred per day. The NSCC data for this period includes only securities with at least 10,000 shares in fails to deliver. To account for securities with fails to deliver below 10,000 shares, the figure is grossed-up by a factor of 2.27. The factor is estimated from a more complete data set obtained from NSCC during the period from September 16, 2008 to September 22, 2008. It should be noted that these numbers include securities that were not subject to the close-out requirement of Rule 203(b)(3) of Regulation SHO.

agency or, alternatively, that it is in compliance with the requirements set forth in Rule 204(e), 2,472,762 times per year (4,695 broker-dealers certifying once per day on 2.09 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/certification).

- V. Pre-Fail Credit Demonstration Requirement: If a broker-dealer purchases or borrows securities in accordance with the conditions specified in Rule 204(e) and determines that it has a net long position or net flat position on the settlement day on which the broker-dealer purchases or borrows securities we estimate that a broker-dealer will have to make such determination with respect to approximately 2.09 securities per day.⁷ As of December 31, 2011, there were 4,695 registered broker-dealers. We estimate that on average, a broker-dealer will have to demonstrate in its books and records that it has a net long position or net flat position on the settlement day for which the broker-dealer is claiming credit, 2,472,762 times per year (4,695 broker-dealers checking for compliance once per day on 2.09 securities, multiplied by 252 trading days in a year). The total approximate estimated annual burden hour per year will be approximately 395,642 burden hours (2,472,762 multiplied by 0.16 hours/demonstration).

The total aggregate annual burden for the collection of information undertaken pursuant to all five provisions is thus 1,849,224 hours per year (395,642 + 269,540 + 392,758 + 395,642 + 395,642).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including

⁷ See supra note 1.

through the use of automated collection techniques or other forms of information technology.

Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: PRA_Mailbox@sec.gov.

Kevin M. O'Neill
Deputy Secretary

June 14, 2012

[FR Doc. 2012-14909 Filed 06/18/2012 at 8:45 am; Publication Date: 06/19/2012]